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No. 91-521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BANCO POPULAR DE PUERTO RICO,

Petitioner,

v.

MUNICIPALITY OF MAYAGUEZ,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Puerto Rico

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PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

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Pursuant to Supreme Court Rule 15.6, petitioner replies to respondents' briefs in opposition as follows:

A. Petitioner Does Not Seek Review of Merely State Law Questions

In its brief, pp. 7-8, 10 and 11, respondent Commonwealth of Puerto Rico[1] repeatedly claims that petitioner is merely seeking review of purely state

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[1] Petitioner is somewhat puzzled by the appearance of the Commonwealth of Puerto Rico as "respondent" herein. Brief in opposition 1. As far as petitioner is concerned, the true respondent is the Municipality of Mayaguez, who has in fact filed and served its own brief in opposition.

law questions. This is not correct. What petitioner has shown is that a state statute and regulation, *as finally interpreted by the Supreme Court of Puerto Rico,* have been rendered nugatory under the Commerce Clause. Indeed, "this Court has established that it is bound to accept the interpretation of state law by the highest court of a state," *id.* 7-8; thus, this Court is bound to accept the interpretation of the statute and regulation by the Supreme Court of Puerto Rico which interpretation renders the statute and regulation invalid under the Commerce Clause.

B. The Decision Below is Final and Ripe for Review By This Court

Respondent Commonwealth of Puerto Rico claims that further proceedings before the trial court are expected and therefore "petitioner has not satisfied its obligation to show that the decisions appealed (sic) from have the required finality to warrant review by this Court." *Id.* 9. The only authority cited by said respondent in support of this proposition is "28 U.S.C. 1258." *Id.* (*see also* petition at 2).

Respondent Commonwealth of Puerto Rico nevertheless has conceded that all that is contemplated on remand to the trial court is a matter of mere arithmetic: ". . . determine the amount of taxes paid, if any, by [petitioner] in New York, California and the U.S. Virgin Islands, and for computation of the real tax deficiency in light of this evidence." *Id.* 6. *No further adjudication or review of the federal (Commerce Clause) question involved herein is contemplated.* Therefore, pursuant to firmly established precedent of this Court, the decision below is "final" for purposes of review by this Court. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975); *Abood v.*

Detroit Board of Education, 431 U.S. 209 (1977); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Mississippi Power & Light Co. v. Moore*, 487 U.S. 354 (1988); *Asarco, Inc. v. Kadish*, 490 U.S. 605 (1989).

C. The Apportionment Formula

Both respondents concede that petitioner operates branches in New York, California and the U.S. Virgin Islands. Comm. Br. 4, 6; Muni. Br. 4. Both respondents coincide in their presentation of the formula for determining petitioner's taxable "volume of business":

Deposits of the bank in the Municipality of Mayaguez	÷	Total deposits of the bank	x Gross income from all sources	= Volume of Business subject to municipal tax in Mayaguez

Comm. Br. 5; Muni. Br. 6.

Both respondents urge this Court to cease further inquiry at this point because, as they allege, said formula is "fair." Comm. Br. 8; Muni. Br. 11.

In so doing, respondents readily admit that the Municipal License Tax is sought to be imposed on "gross income from all sources" regardless of whether or not any part of such income is "attributable" to the taxing jurisdiction. Comm. Br. 8-9; Muni. Br. 9 and 10. Respondent Municipality of Mayaguez recognized that this issue was "avoided" by the Puerto Rico Supreme Court, purportedly "because it was not necessary." Muni. Br. 9. Respondents thus base their claim to "fairness" solely upon the formulaic "apportionment" of such gross income according to the

ratio which deposits in branches within the municipality may bear to the "total deposits of the bank."[2]

This apparently simple solution is defective for the following reasons:

First: Article 2(7)(B) of Regulation No. 3142 specifies that taxable gross income of banks includes all kinds of "income derived from any . . . source within or outside of Puerto Rico, attributable to the operation in Puerto Rico." Pet. 5-6. The Puerto Rico Supreme Court, in both its 1988 and 1990 opinions, stressed that it is only income which is "received" in Puerto Rico that is to be considered taxable. Ap. 8a, 9a, 21a, 22a. It would not be necessary to consider whether income is "attributable" to or "received" in Puerto Rico if *all* income were to be indiscriminately included in the tax base which is then apportioned among the various municipalities.

Second: The 1990 opinion of the Puerto Rico Supreme Court is inconsistent in its expression of the deposit ratio, at times stating that the total deposits of the bank, wherever located, must be included in the denominator, but at one point limiting said base to "total deposits of the financial organization *in Puerto Rico*" (Ap. 22a; emphasized). This inconsistency is not insignificant: the Municipal License Tax

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[2] Respondent Municipality of Mayaguez even goes as far as claiming that the apportionment formula is not only "fair," but also that it "does not require a tax credit provision for it to be constitutional." Muni. Br. 11. In this respect, respondent Municipality of Mayaguez contradicts respondent Commonwealth, who has steadfastly argued that it is precisely the Puerto Rico Supreme Court's recognition of the alleged tax credit which saved the day and rendered the otherwise invalid statute and regulation constitutional. Comm. Br. 5, 7, 8, 10.

Act was recently amended to adopt the latter definition of the deposit ratio. Act No. 82 of August 30, 1991. Article 1 of Act No. 82 amends the 1974 statute to read, in its pertinent portion, as follows (new language underscored; compare Pet. 8a):

> In the specific case of commercial banks and savings and loan associations, mutual savings bank, gross revenue will mean the interest received or earned from loans, the service charges, the revenue, the gross earnings from the sale of properties or securities, and the profits, earnings and income derived from any other origin *within and outside Puerto Rico attributable to the operation in Puerto Rico.*
>
> The gross income derived from these organizations subject to the payment of gross receipts tax will be distributed among the branches according to the proportion all the types of deposits of the branch bear to the total deposits of the organization *in Puerto Rico.*

Petitioner contends that, even assuming, *arguendo,* that the deposit ratio governs the determination of its taxable gross income, any apportionment formula which includes *all* foreign source income but then excludes *all* foreign deposits can hardly be considered "fair" or in compliance with the Commerce Clause.

Petitioner readily concedes that the Commerce Clause does not compel any particular, specific apportionment formula for taxation of income derived from interstate commerce. However, it is also clear that the Commerce Clause precludes any apportion-

ment formula which is at once ambiguous in its definition of taxable income and wholly devoid of an effective allocation formula.

In this instance, an uncertain deposit ratio is sought to be applied, as the sole factor, to a determination of petitioner's taxable income and resulting tax liability. Petitioner respectfully requests that certiorari be granted herein to consider the question of the validity under the Commerce Clause of such a tax on income derived from the interstate conduct of its banking business

D. Conclusion and Relief Sought

This Court should issue a writ of certiorari to review the 1988 and 1990 decisions and 1991 order of the Puerto Rico Supreme Court, as petitioner hereby very respectfully demands.

Respectfully submitted.

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